APPENDIX A

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

WILLIAM WALTER REMINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI

Petitioner, William Walter Remington, respectfully requests the Supreme Court of the United States to dispense with the printing of the record in connection with the consideration of the petition for certiorari and in support of said request sets forth the following:

(1) The record was not printed in the Court of Appeals, that Court having issued an order dispensing with the printing of the record and allowing review on the typewritten record.

(2) Petitioner's entire financial resources were utilized at the trial. He has no assets, real or personal, other than his personal effects; he has no regular income from any source whatever; he is heavily in debt. Consequently, he is unable to pay the cost of printing the record.

(3) The typewritten transcript of the proceedings of the trial and sentencing contains 4045 pages. Petitioner is unable to raise the money, through borrowing or from other sources, to provide for the printing of such a lengthy transcript.

WHEREFORE, for the reasons set forth above, it is respectfully requested that this Court grant petitioner's motion to dispense with the printing of the record in connection with the consideration of the petition for certiorari.

Respectfully submitted,

WILLIAM C. CHANLER
JOSEPH L. RAUH, JR.
Attorneys for Petitioner

DARK PAGE BLEED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—October Term, 1950.

(Argued June 15, 1951 Decided August 22, 1951.)

Docket No. 22045

UNITED STATES OF AMERICA

Appellee,

—v.—

WILLIAM REMINGTON,

Appellant.

Before:

SWAN, *Chief Judge,* AUGUSTUS N. HAND and L. HAND, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York.

The defendant appeals from a judgment of conviction and sentence under an indictment charging him with perjury, 18 U. S. C. A. §1621, in testifying falsely before a grand jury. Judgment reversed and cause remanded.

WINTHROP, STIMSON, PUTNAM & ROBERTS, *Attorneys for appellant;* William C. Chanler, Joseph L. Rauh, Jr., and James S. Rosenman, of Counsel.

OTHRU

IRVING H. SAYPOL, United States Attorney, *for appellee;* Bruno Schachner, Roy M. Cohn, John M. Foley, Albert A. Blinder, Joseph N. Friedman, James B. Kilsheimer, III, Stanley D. Robinson and Robert Rubinger, Assistant United States Attorneys, of Counsel.

SWAN, *Chief Judge*:

After a protracted jury trial the appellant was found guilty of the crime of perjury in testifying before a grand jury that he had never been a member of the Communist Party.[1] The evidence submitted to the jury related to three periods, in each of which the prosecution specified in a bill of particulars that the appellant was a member of the Party. The first period covered the years 1936-7, when he was employed as a TVA messenger at Knoxville, Tennessee; the second covered the years 1937-40, during which he was a student at Dartmouth and Columbia; and the third covered the years 1940-44, when he was employed in Washington.[2] The jury's general verdict gives no intimation as to the period or periods in which they found him to have been a member of the Communist Party. The appeal challenges the validity of the indictment, the sufficiency of the evidence, the adequacy of the charge to the jury, and the correctness of numerous rulings of the court in the course of the trial. Our conclusion that the judgment must be reversed on account of the inadequacy of the charge

---

1 18 U. S. C. A. §1621.

2 Evidence as to an earlier period, 1934-6, covering the appellant's freshman and sophomore years at Dartmouth, was withdrawn from the jury.

to the jury makes unnecessary discussion of many of appellant's contentions.

1. The Indictment: At the commencement of the trial the court denied a motion to dismiss the indictment for failure to state an offense. The indictment alleged that in May 1950 the defendant appeared as a witness before a grand jury for the southern district of New York, which was investigating possible violations of the espionage laws; that he was asked the question: "At any time have you ever been a member of the Communist Party?" and he answered under oath, "I have never been"; and that "the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party." The statute defines the crime of perjury to be stating under oath "any material matter which he does not believe to be true."[3] Thus perjury consists in testifying to the truth of a fact which the accused does not believe to be true;[4] his oath must contradict his belief as to the fact sworn to, for otherwise his oath is not wilfully false. In the case at bar the indictment charged that Remington did not believe his denial of membership in the Communist Party, since it alleged that he "well knew and believed" that his testimony was untrue. The further allegation that he had in fact been a member of the Party was surplusage,[5] but proof

3 Tit. 18, U. S. C. A. §1621: "Whoever, having taken an oath before a competent tribunal, * * * that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *"

4 *Regina* v. *Schlesinger*, 2 Cox C. C. 200; *State* v. *Cruikshank*, 6 Blackf. (Ind.) 62; *Com.* v. *Milles*, [sic] 140 Ky. 577; *State* v. *Gates*, 17 N. H. 373; 1 Hawkins, Pleas, 1787 ed. c. 69, §6, p. 322; 2 Wharton, Criminal Law, 12th ed., §§1512-13.

5 *United States* v. *Hiss*, 2 Cir., 185 F. 2d 822, 831, cert. denied 340 U. S. 948; *Sharron* v. *United States*, 2 Cir., 11 F. 2d 689, 690.

of the fact of membership might be relevant on the issue of his belief that he had been a member. There was no error in denying the motion to dismiss the indictment for failure to charge a crime.

2. Sufficiency of the Evidence: As to this it will suffice to say that we find no error in the court's refusal to direct a verdict of acquittal. Since the evidence upon a new trial, if there be one, may be different, there is no need to discuss the evidence in the present record.

3. The Charge: The principal attack upon the judgment of conviction concerns the charge to the jury. It contained the following instruction:

> "To find membership in the Communist Party you must find that the defendant performed the act of joining the party. The act of joining is crucial. This is not to say that you must find evidence of the very act of joining the party, but rather from all the evidence you must be convinced beyond a reasonable doubt that he was, in fact, a member of the Communist Party, and was accepted as such by the Party."

This is all we can find by way of definition of what constituted membership in the Party. To this instruction the defendant excepted, because the language following the statement that "the act of joining is crucial" made the charge too "vague and indefinite" to constitute any definition at all of what facts the jury must find in order to convict the defendant. Because of the peculiar rule concerning proof in perjury cases, we think the exception was well taken. That rule requires "direct" proof of the crime by two witnesses who testify that the accused violated his oath, or "direct" proof by one witness plus corroborating

circumstances.[6] Since the crime of perjury consists in the contradiction between the accused's oath and his belief, the only "direct" evidence of his guilt would seem to be his own declarations of his belief. But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated.[7] This distinction was laid down in *United States* v. *Wood*, 14 Pet. 430, which has been often followed.[8] Since only written declarations will suffice, it follows that if the critical issue must be proved by "direct" evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by "direct" evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411, where it is said:

> "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations

---

6 See *United States* v. *Wood*, 14 Pet. 430; *United States* v. *Hiss*, 2 Cir., 185 F. 2d 822, 824, cert. denied 340 U. S. 948; *United States* v. *Otto*, 2 Cir., 54 F. 2d 277, 279; *Clayton* v. *United States*, 4 Cir., 284 F. 537, 539-40; *Radomsky* v. *United States*, 9 Cir., 180 F. 2d 781, 782-3.

7 We lay to one side a possible exception as to contradictory oral declarations made by the accused under oath, as the case at bar involves no declarations of this character. See Wigmore, Evidence, 3rd ed., §2043.

8 *Clayton* v. *United States*, 4 Cir., 284 F. 537, 540; *Phair* v. *United States*, 3 Cir., 60 F. 2d 953, 954; *Hart* v. *United States*, 9 Cir., 131 F. 2d 59, 61; *Fotie* v. *United States*, 8 Cir., 137 F. 2d 831, 840. Compare *United States* v. *Harris*, 311 U. S. 292.

> of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing."

Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some "overt act" from which the jury may "infer" the accused's actual belief.

We do not see how the perjury rule can in practice be applied at all in such a case as the present unless the judge shall single out such "overt acts" as furnish a rational basis for inferring what the accused thought constituted membership and which were supported as the rule requires, and shall then instruct the jury that unless they believe the testimony as to such facts—or at least one of them—and think that because of it, taken with any corroborating evidence, the accused must have believed he was a member, they cannot find him guilty. The jury's verdict of guilt presupposes that they have made some definition of their own as to what the accused thought constituted membership and have found some act by him from which they have inferred that he believed himself a member, as so defined. Surely the definition of membership is a vital part of the "overt acts" from which the accused's belief is to be inferred. Unless the court shall instruct the jury in the manner suggested, the rule becomes no more than that there must be in the "direct" proof some "overt act" from which the jury might "infer" the guilty state of mind, but which they may totally disregard in finding their verdict. To ascribe such meaning to the rule would deprive the accused of the full protection which it is intended to afford him. Moreover, the vagueness of the charge was increased by the instruction that the jury

might draw the reasonable inferences and conclusions from the evidence, whether the evidence be a direct statement of fact or of circumstance. The jury was told, "You may not have direct proof of a fact but you may have circumstances from which you are able to draw reasonable conclusions and deductions." Hence, despite recital in the charge of the rule as to two witnesses or one corroborated witness, the jury may have thought that they could select such evidence as they chose as proof of guilt and were free to convict on circumstantial evidence alone, which is not the law in the federal courts.[9]

As indicated above it is our opinion that the perjury rule requiring direct evidence cannot be applied unless the court specifically declares what are the "overt acts" which the jury must find, and which the court decides are properly supported under the perjury rule and of themselves form a rational support for finding that the accused's oath and his belief conflicted. In the case at bar this demanded that the judge point out what facts so supported would justify a finding that the accused did not believe that he had never been a member of the Communist Party. Whatever may be thought of the archaic rule as to proof of perjury, it is still the law in the federal courts and its breach in this case operated unfairly, for the accused never learned until the filing of the government's brief on appeal what acts the prosecution would contend showed that he believed himself to have been a member of the Party. In opposing a motion for a bill of particulars, counsel for the government argued that it was "most difficult" to define what constituted membership; and the court did not require the prosecution to specify what facts it would rely on to prove an act of joining or to justify an inference that the accused

9 *United States* v. *Otto*, 2 Cir., 54 F. 2d 277, 279; *Clayton* v. *United States*, 4 Cir., 284 F. 537, 539; *Radomsky* v. *United States*, 9 Cir., 180 F. 2d 781, 782-3.

knew he was a member. The result of leaving the issue so at large was that, as the case was tried, the defendant did not know even at the end of the government's case what he had to meet; he could only guess what the prosecution was going to say he thought to be membership. It is now argued that use of the Party's postoffice box in Knoxville in 1937 and the payment of dues to the Party in Washington in 1942-4 prove that he knew he was a member in each of those periods. If there should be another trial, we think that the prosecution should be compelled to declare in a bill of particulars those "overt acts" which it will prove as required in perjury and from which it will argue that the accused believed that he had been a member of the Communist Party. This will not prevent the prosecution from introducing other and corroborating evidence.

Complaint is made of the court's refusal to charge request No. 64, which was that all the jurors must be convinced that the accused was a member of the Party "at a particular time and place," and if some thought he was at one time only and some at another, they could not convict him. That request was right and should be given if there is a new trial; but we are not prepared to hold the failure to give it was reversible error since the substance of it was probably covered, though not so explicitly, by the charge that the jury must be unanimous and that "Proof of membership in the Communist Party at any one time during that period [1934-1944] is sufficient."

4. Rulings in the Course of the Trial: We now turn to questions which may arise again, if there be a new trial. The court denied the defendant's motion to inspect the minutes of his own testimony before the grand jury. We think inspection before trial should have been allowed. As already stated, the essential issue in perjury is whether the accused's oath truly spoke his belief; all else is contribu-

tory to that issue. In deciding it the jury was entitled to know, and the accused was entitled to show, what had gone before the critical question and answer, since this might throw light on how he understood the question and what he meant by his answer. For example, if he had previously testified that he never had a Party card, that might indicate that he believed that without a card he could not be a member. His memory of what he said is no adequate substitute for the minutes themselves. It is one thing to deny the defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his own testimony which may afford him an affirmative defense. Even if the prosecution's use of the allegedly perjurious answer did not, by itself, open the door to the rest of the defendant's testimony,[10] we think he was entitled to it under the principle of this court's decision in *United States* v. *Andolschek*.[11] We there held that an accused must be given access to his own official reports which might directly support his defense, even though disclosure of such reports was forbidden by a valid administrative regulation.[12] *A fortiori*, access should not be denied where, as here, inspection of the grand jury minutes is a matter within judicial discretion. We see no good reason for suppressing the evidence under these circumstances.

The defendant's request to inspect the grand jury minutes of the testimony of Ann Remington, his former wife, was also denied. Such denial was proper unless, as the

---

10 *Cf. United States* v. *Cotter*, 2 Cir., 60 F. 2d 689, 692, cert. denied 287 U. S. 666; Wigmore, Evidence, 3rd ed., §2113.

11 142 F. 2d 503, 506.

12 See also *United States* v. *Grayson*, 2 Cir., 166 F. 2d 863, 870; *United States* v. *Beekman*, 2 Cir., 155 F. 2d 580, 584; *Edwards* v. *United States*, 312 U. S. 473, 481.

defendant contends, Mrs. Remington admitted in her trial testimony that she had changed her story during the course of her grand jury testimony. It is not entirely clear from the present record whether the change of story occurred before or after she began testifying before the grand jury. This ambiguity will undoubtedly be cleared up, if a new trial is had, and it will here suffice to refer to *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76, 78-9, reversed on other grounds 336 U. S. 440, which, if the appellant's interpretation of her trial testimony is correct, requires that her grand jury testimony be made available to the defense.[13]

During presentation of the government's case, the appellant offered to prove that a number of prospective witnesses had been called before grand juries other than the one which had indicted him; that the government's purpose in calling the witnesses was to intimidate them; and that some of them had been intimidated. The defense moved to suppress the testimony of all such witnesses on the ground that this method of preparing the government's case was an abuse of process which tainted the entire evidence so obtained. While we agree that if the government's purpose was as charged, its conduct was unfair and ought not to be condoned, we know of no authority, and none has been cited, for suppressing evidence obtained in this manner. We think the only remedy of the defense is to examine such witnesses as it claims were intimidated and prove, if it can, that such was the fact. Evidence of efforts to suppress testimony or evidence in any form like the spoliation of documents is affirmative evidence of the weakness of the prosecution's case.[14] We do not mean that it would be relevant to this issue to show that a grand

---

13 See also *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, 92, cert. den. 323 U. S. 799.

14 See Wigmore, Evidence, 3d ed., §278. *Cf. United States* v. *Freundlich*, 2 Cir., 95 F. 2d 376, 378-9; *People* v. *Chin Hane*, 108 Cal. 597, 603.

jury was called for the express purpose of intimidating witnesses. That is a matter for disciplinary action by the court and does not concern the accused. His interest in the matter is limited to intimidation of his prospective witnesses, which can be brought out as part of the defense evidence which goes to the jury.

Over defense objections the prosecutor was permitted to make numerous references to the Attorney General's list of subversive organizations during the defendant's cross-examination. This was error, for the list is a purely hearsay declaration by the Attorney General, and could have no probative value in the trial of this defendant.[15] It has no competency to prove the subversive character of the listed associations and, failing that, it could have no conceivable tendency to prove the defendant's alleged perjury even if it were shown that he belonged to some or all of the organizations listed.

We will not at this time deal with the appellant's contention that the indictment should be quashed because of improprieties in the grand jury room which were allegedly committed by the foreman of the grand jury. It is contended that the foreman, one Brunini, had a financial interest in a book which the government's chief witness was writing and that he exercised undue influence in the procurement of the indictment, particularly during the grand jury's examination of the defendant. Since we have already held that the accused must be given access to the minutes of his own testimony before the grand jury, it will appear upon inspection whether Brunini abused his powers, at least in that part of the proceedings. The indictment should not be quashed unless undue influence is shown.[16] It is true that Brunini's alleged abuse of powers

---

15 *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 *passim*.

16 *United States* v. *Thompson*, 2 Cir., 144 F. 2d 604, 606, cert. den. 323 U. S. 790; Fed. Rules Cr. Proc., Rule 6(b)(2), 18 U. S. C. A.

may have occurred while the defendant was not on the stand, and that without examination of the rest of the grand jury minutes the defendant may not find it possible to show undue influence. But we are unwilling to turn the indictment procedure into a separate trial. Although it is possible that some abuses may thus go uncorrected, it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove, since an indictment is, after all, no more than an accusation.

The remainder of the appellant's contentions do not require discussion. We wish, however, to admonish counsel for the prosecution that in case of a retrial there should be no repetition of the cross-examination attack upon defense witness Redmont's change of name. Redmont testified that he had changed his name for professional reasons and that he had done so pursuant to court order. On cross-examination the prosecutor continued his inquiry of this matter long after it became clear that the change of name had no relevancy to any issue at the trial, and could only serve to arouse possible racial prejudice on the part of the jury.

Judgment reversed and cause remanded.

DARK PAGE BLEEDTHRU

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT.

The United States hereby moves for leave to apply to the District Court for leave to dismiss the indictment in the instant case.

Petitioner was indicted and convicted for perjury in having denied before a grand jury that he had "ever been a member of the Communist Party." His conviction was reversed by the Court of Appeals for errors occurring during the trial. Since the court refused to hold the indictment invalid or to direct an acquittal, it left the Government free to try petitioner again. The petition for certiorari challenges the action of the Court of Appeals principally upon the grounds (1) that improper conduct of a grand juror invalidated the

indictment (Pet. I, pp. 9-31);[1] (2) that the indictment was not specific enough in informing petitioner of what he had to meet (Pet. II, pp. 28-31);[2] and (3) that the court below (in reversing the District Court on the point) did not give proper effect to the "direct evidence" rule applicable in perjury cases in relation to the nature of the proof required to show membership in the Communist Party (Pet. III, pp. 31-49, App. vi-x).

On October 25, 1951, a grand jury which had been empaneled in the Southern District of New York on October 1 returned an indictment in five counts charging that at his trial in the instant case petitioner falsely testified (1) that he never knowingly attended a Communist Party meeting, (2) that he never paid Communist Party dues, (3) that he never gave any secret classified information to any unauthorized person, (4) that he never asked anyone to join the Communist Party, and (5) that he was not a member of and did not know until last year of the existence of the Young Communist League at Dartmouth College during his attendance there. Petitioner was arraigned under the new indictment on October 30, pleaded not guilty,

---

[1] The court below refused to pass upon this question, but left the matter open for further exploration in the event of a new trial, at which the petitioner would have access to the grand jury minutes of his own testimony. (Pet. App. viii).

[2] The court below held the indictment sufficient on its face, but also stated that the prosecution should furnish a bill of particulars in the event of a new trial (Pet. App. v-vi, x).

and the trial has been tentatively set for December 10.

This new indictment is not subject to any of the alleged infirmities upon the basis of which the petition for certiorari has attacked the validity of the indictment herein. Under the new indictment, there is no question as to the propriety of the conduct of any of the grand jurors. The acts of perjury charged are specific. And the question raised by the petition as to the application of the perjury rule to a charge of falsification as to membership in the Communist Party will not be present in a trial on the directly provable allegations of perjury charged in the new indictment. Any possible defect in the first indictment or in the procedure whereby it was obtained, or in the evidence or charge to the jury at the first trial, would not prevent a prosecution for perjury committed during the course of that trial. *United States* v. *Williams,* 341 U.S. 58.

Under the judgment of the Court of Appeals, the Government would be entitled to re-try the petitioner under the first indictment. But the Government does not intend to press that charge, and will dismiss that indictment as soon as leave of court is obtained. If a petition for certiorari had not been filed, the Government would have a right, with leave of the District Court, to file a dismissal of the first indictment in that court. Rule 48(a), Rules of Criminal Procedure. The judgment of the Court of Appeals reversing the conviction does not, of course, preclude the government from dismissing

the indictment instead of proceeding to a new trial.[3] The fact that a petition for certiorari has been filed, however, makes it uncertain whether the District Court may grant leave to dismiss while the case is pending in this Court, without leave of this Court.

In order to remove this possible obstacle to dismissal in the District Court, the permission of this Court is requested. Inasmuch as the Court may not wish to dispose of the petition for certiorari until the indictment is dismissed in the District Court, the Court may deem it appropriate to grant the Government leave to move to dismiss in the District Court, meanwhile holding the petition for certiorari. Another procedure which would adequately protect the rights of all involved would be to deny the petition for certiorari without prejudice to a petition for rehearing if the indictment is not dismissed in the District Court.[4]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1951.

---

[3] The mandate of the Court of Appeals has gone down.

[4] If this motion is not granted, the Government will file a brief in opposition to certiorari, based in part on the prematurity of the petition in view of the need for a new trial before petitioner can be convicted. Inasmuch as the Government does not intend to re-try petitioner under the indictment here involved, thereby mooting the issues sought to be raised, the prematurity is even more evident.

☆ U.S. GOVERNMENT PRINTING OFFICE 1951—974184/P.O. 397

Office-Supreme Court, U.
FILED
NOV 21 1951
CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE BY PETITIONER TO MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Counsel for Petitioner.

WILLIAM C. CHANLER,
JOSEPH L. RAUH, JR.,
JOHN K. TABOR,
Of Counsel.

INDEX

PAGE

INTRODUCTORY 1

STATEMENT OF FACTS 2

RULE INVOLVED 6

ARGUMENT:

I—The indictment cannot be dismissed without petitioner's consent 6

II—This Court should deny the government leave to dismiss the indictment because dismissal at this stage in the proceedings will gravely prejudice petitioner's rights 8

A. A dismissal will prevent an adjudication by this Court of the unconstitutional conduct of the United States Attorney which affects the validity of the reindictment 11

B. A dismissal will prevent an adjudication by this Court that petitioner is entitled to a judgment of acquittal and thus will subject him to the possibility of further indictments 13

III—The Court should not assist the government in this harassing maneuver by exercising its discretion to grant the government's motion 15

IV—The instant case is appropriate for a confession of error by the United States 22

CONCLUSION 25

APPENDIX A—Indictment i

APPENDIX B—Petition for Certiorari (Bound separately)

Table of Cases Cited

	PAGE
Baddars v. *United States*, 240 U. S. 387 (1916)	21
Bates v. *United States*, 323 U. S. 15 (1944)	23
Bellaskus v. *Crossman*, 335 U. S. 840 (1948)	23
Black v. *State*, 13 Ga. App. 541, 79 S. E. 138 (1908)	18
Blockburger v. *U. S.*, 270 Fed. 441 (8th Cir. 1920)	21
Bossio v. *U. S.*, 16 F. 2d 57 (9th Cir. 1926)	21
Bozza v. *United States*, 330 U. S. 160 (1947)	23
Braden v. *U. S.*, 270 Fed. 441 (8th Cir. 1920)	21
Braverman v. *United States*, 317 U. S. 49 (1942)	21
Butler v. *Denton*, 150 F. 2d 687 (C.C.A. 10, 1945)	10
Chandler Bldg. Corp. v. *Shannon*, 1 F.R.D. 105 (D. Cal. 1939)	10
Chang Chow v. *United States*, 286 U. S. 350 (1932)	23
Cincinnati Traction Bldg. Co. v. *Pullman Standard Car Mfg. Co.*, 25 F. Supp. 322 (D. Del. 1938)	10
City of Detroit v. *Detroit-City Ry. Co.*, 55 Fed. 569 (C.C.E.D. Mich. 1893)	11
Coleman v. *State*, 83 Miss. 290, 35 So. 937 (1904)	9
Colonial Oil Co. v. *American Oil Co.* (E.D.S.C. 1943), 3 F.R.D. 29	10
Communications Ass'n v. *Douds*, 339 U. S. 382, 410-411 (1950)	5
Confiscation Cases, 7 Wall. 454, 457 (1868)	7, 9
Evans v. *Teche Lines*, 112 F. 2d 933 (C.C.A. 5, 1940)	10
Ex parte Lancaster, 206 Ala. 60, 89 So. 721 (1921)	9
Fawick Airflex Co. v. *United Electrical, R. & M. Wkrs.*, 92 N. E. 2d 431 (Ohio 1950)	18
Fogel v. *United States*, 335 U. S. 865 (1948)	23
Gibson v. *United States*, 329 U. S. 338	23
Hat-Sweat Manufg. Co. v. *Waring*, 46 Fed. 87 (C.C. S.D.N.Y. 1891)	11
Henjes v. *Aetna Insurance Co.*, 39 F. Supp. 418, 419 (E. D. N. Y. 1941)	10
In re Almeida, —— F. Supp. ——, 19 Law Week. 2543	11
In re Barnett, 124 F. 2d 1005 (C.C.A. 2, 1942)	10

PAGE

Johnston v. *Lagomarsino*, 88 F. 2d 86 (9th Cir. 1937) 21

Leonard v. *U. S.*, 18 F. 2d 208 (6th Cir. 1927) 21
Love v. *State*, 272 Pac. 1035 (1928) (Cir. Ct. of App. Okla.) 9

McLaren v. *State*, 4 Ga. App. 643, 62 S. E. 138 (1908) 18
McNabb v. *United States*, 318 U. S. 332, 340 11
Mitchell v. *United States*, 142 F. 2d 480 (10th Cir. 1944) 21

Nardone v. *United States*, 308 U. S. 338, 341 12

Olsen v. *Muskegon Piston Ring Co.*, 117 F. 2d 163, 165 (C.C.A. 6, 1941) 10

Palmer v. *Delaware, L. & W. R. Co.*, 222 Fed. 461, 464 (N.D.N.Y. 1915) 10
Parlton v. *United States*, 75 F. 2d 772, 773 (D.C.C. 1935) 23
People v. *Bogolowski*, 317 Ill. 460, 148 N. E. 260 (1925) 9
People v. *McDonnell*, 100 N.Y.S. 2d 463 (1950) 19
Petti v. *United States*, 336 U. S. 916 (1949) 23
Pyle v. *Kansas*, 317 U. S. 213 11

Ryles v. *United States*, 336 U. S. 949 (1949) 23

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 392 12
State v. *Anderson*, 35 Utah 496, 503, 101 Pac. 385 (1909) 18
State v. *Bishop*, 1 D. Chip. 120 (Vt. 1797) 17
State v. *Bordeaux*, 93 N. C. 560 (1885) 18
State v. *Milano*, 138 La. 989, 71 So. 131 (1916) 9
State v. *Reidt*, 54 S. D. 178, 222 N. W. 677 (1929) 18
State v. *Shannon*, 136 Me. 127, 3 A. (2d) 899 (1939), 20 A.L.R. 1166 ..... 17, 20
Stevens v. *McClaughry*, 207 Fed. 18 (8th Cir. 1913)..... 21

United States v. *Emspak*, 95 F. Supp. 1012 (D.D.C. 1951) 18

PAGE

United States v. *Ragen*, 86 F. Supp. 382 (N. D. Ill. 1949) 11
United States v. *Schumann*, 27 Fed. Cas. No. 16,235..... 7
United States v. *Shoemaker*, 27 Fed. Cases No. 16,279 (C. C. Ill.) 7
United States v. *Snow*, 120 U. S. 274 (1887) 21
United States v. *Stowell*, 27 Fed. Cas. No. 16,409 7
U. S. v. *Weiss*, 293 Fed. 992 (N.D. Ill. 1923) 21
United States v. *Williams*, U. S. Sup. Ct., April 23, 1951 16
United States v. *Yukio Abe*, 95 F. Supp. 991 (D. Hawaii 1950) 18

Wixman v. *United States*, 335 U. S. 874 (1948) 23

Yim Kim Lau v. *United States*, 286 U. S. 531 (1932) 23
Young v. *So. Pac. Co.*, 25 F. 2d 630, 632 (C.C.A. 2, 1928) 11
Young v. *United States*, 315 U. S. 257, 258 (1942)..... 23

Statutes Cited

Federal Rules of Criminal Procedure:

Rules 1, 2, 54(a) (1) 8
Rule 7 (2) 1, 25
Rule 41 11
Rule 41 (a) 10
Rule 41 (b) 10
Rule 48 (a) 6, 8, 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE BY PETITIONER TO MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

Petitioner, William Walter Remington, refuses his consent to the government's motion for leave to dismiss the indictment and requests this Court, in order to prevent irreparable prejudice to petitioner's rights and a grave miscarriage of justice, (i) to assign the government's motion for full briefing and oral argument pursuant to Rule 7(2) or, (ii), in the alternative, to grant the petition for certiorari and postpone decision on the motion until the argument on the merits.

The government's motion fails to disclose to the Court the serious issues involving the Constitution of the United States and the integrity of the judicial process which the motion in fact raises. The government seeks to avoid

these fundamental issues by asking this Court to rule upon its motion for a dismissal of the indictment without consideration of the pending petition for certiorari. Petitioner believes that the government's motion cannot properly be considered *in abstracto* without relation to the issues raised by the petition and, therefore, urges the Court to consider the petition for certiorari at this time along with the government's motion. To this end, we attach hereto as Appendix B a copy of the petition for certiorari. In view, however, of the inadequate statement of the case contained in the government's motion, the facts set forth in the petition in so far as they bear upon the present motion are summarized herein for the convenience of the Court.

Statement of Facts

On July 30, 1948, ex-Communist spy, Elizabeth T. Bentley, appeared before an investigating committee of the United States Senate and charged Remington with having been a member of the Communist Party in the early war years and with having given her secret government information at that time (R. 1312). Remington promptly denied her accusations under oath. Grave doubt was cast upon Bentley's story when, in February, 1949, Remington was publicly cleared by the President's Loyalty Review Board of charges based on Bentley's accusations (R. 1355-9) and again when, in February, 1950, a libel suit based on Bentley's charges on a television program was settled by the television network and the sponsor paying Remington $9,000 (R. 1372, 1382).

Nevertheless, in May, 1950, Remington was subpoenaed before a grand jury in the Southern District of New York, and examined at length regarding Bentley's charges and supporting evidence (R. 2623). On June 8, 1950, Remington was indicted for denying to that grand jury that he had "ever been a member of the Communist Party" (R. ix). Remington pleaded not guilty, and on

December 18, 1950, his trial commenced. During the course of the trial, in at least partial explanation of the indictment of a man previously cleared, the following facts appeared:

(1) At the time of the indictment, the foreman of the indicting grand jury, one John Brunini, was collaborating with chief prosecution witness Bentley in the preparation and publication of a book of memoirs (R. 1598-1607), the success of which depended upon the rehabilitation of her credibility through Remington's indictment.

(2) The prosecution's case was presented to the grand jury by Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-4), who had previously been Bentley's personal attorney in litigation arising out of her espionage activities (R. 1388-90, 1280-5).

(3) One of the first witnesses before the grand jury was Joseph A. Egan, Bentley's present personal counsel, who had represented Bentley in the libel suit brought against her by Remington (R. 1391, 1496) and whose testimony could only have been incompetent and prejudicial since he did not know Remington.

(4) Foreman Brunini and prosecutor Donegan interrogated Remington, during a five-day grilling before the grand jury (R. 2664), on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party (R. 1515-16), and finally indicted him for denying such membership.

As soon as these facts became known during the course of the trial, petitioner moved to dismiss the indictment (R. 1513). The United States Attorney vigorously opposed this motion to dismiss, although he announced that the "files of the government contain a full narrative of these incidents" and that he had discussed these matters with the Attorney General of the United States (R. 1526-7). Despite the fact that the United States

Attorney had had this "full narrative" of the facts in his possession since the time of the voting of the indictment and had deemed them sufficiently serious to take up with his superior in Washington, he failed either to enter a *nolle prosequi* at that time, or to make these facts known to the defense. The misconduct in failing to disclose was compounded by the United States Attorney's effort, through "trick" questions to defendant's witnesses and by shouting to the jury that these witnesses were "liars" (R. 1631), to create the impression to judge and jury that the entire story of the Brunini-Bentley collaboration was a fabrication. These tactics were all the more reprehensible because the United States Attorney, with the district judge's consent, was at the same time denying petitioner the right to examine the "full narrative of these incidents" and the minutes of the indicting grand jury (R. 1367).

The district court refused to dismiss the indictment (R. 1527, 1624-5), Remington was found guilty by the jury (R. 4027) and given the maximum sentence provided by law (R. 4041). Remington appealed his conviction and on August 22, 1951, the court of appeals reversed the action of the district court and remanded the cause. The court held, *inter alia*, that the judge's charge to the jury had been erroneous, that the defendant had not known until the trial was over what he had to meet, and that many other errors had been committed.*

On September 20, 1951, petitioner applied to Mr. Justice Jackson for a 30-day extension of time within which to file his petition for writ of certiorari, pointing out that the court of appeals had

> (i) Failed to dismiss the indictment, despite proof in the record that at the time of the indictment

* The opinion of the court below is reprinted at pp. iii-xiv of the petition for certiorari (hereinafter referred to as "petition"). The typewritten record is on file with the Clerk of this Court, along with a motion to dispense with printing the record (Petition, pp. i-ii).

the foreman of the indicting grand jury was collaborating with the chief prosecution witness, one Elizabeth T. Bentley, in writing a book based in part upon her charge that the defendant had been a member of the Communist Party;

(ii) Failed to grant defendant's prayer for acquittal, despite the prosecution's admission that it had no proof whatever of an "act of joining the Party," as required by *Communications Ass'n.* v *Douds,* 339 U. S. 382, 410-411 (1950), the court of appeals holding that it was not necessary for the government either to allege or prove that the defendant had in fact been a member of the Communist Party.

On the same day, September 20, 1951, Mr. Justice Jackson granted the application for a 30-day extension of time and notice was promptly served upon the government. On October 19, 1951 the petition for certiorari (Appendix B) was filed in this Court.

Six days later, on October 25, 1951, petitioner was re-indicted on 5 counts charging that at his trial in this case he had testified falsely in denying five items of evidence introduced by the government in support of its contention that he had been a member of the Communist Party: (1) that he ever knowingly attended Communist Party meetings, (2) that he had given information to Bentley to which she "was not entitled", (3) that he had ever paid Communist Party dues, (4) that he ever asked anyone to join the Communist Party, and (5) that he had any knowledge of the existence of the Young Communist League at Dartmouth College, where he had been a student from 1934 to 1939. The new indictment is annexed as Appendix A.

Petitioner pleaded not guilty to the re-indictment on October 30, 1951. District Judge Leibell ruled that the defense should be allowed time to file its motions directed

to the re-indictment until after the Supreme Court had acted upon the petition for certiorari based upon the first indictment. Judge Leibell set December 10, 1951, as the date for the filing of these motions, but gave petitioner the right to ask for further time if final action by this Court had not been taken by that date. On November 2, 1951, three days after Judge Leibell's ruling, the government filed its motion for leave to apply to the district court for leave to dismiss the indictment, stating that the defendant had been re-indicted on counts which were "not subject to any of the alleged infirmities upon the basis of which the petition for certiorari had attacked the validity of the indictment herein", and that it no longer intended to press the charge that the defendant had lied when he denied that he had ever been a member of the Communist Party.

Rule Involved

Rule 48(a) of the Federal Rules of Criminal Procedure provides as follows:

> "RULE 48. DISMISSAL.
>
> "(a) *By Attorney for Government.* The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

I

The indictment cannot be dismissed without petitioner's consent.

The government's motion for leave to dismiss at this stage of the proceedings raises a novel and important question under Rule 48(a) which does not appear to have been passed upon by any court. It is petitioner's belief,

however, that Rule 48(a) prohibits the dismissal of the indictment at this stage of the proceedings without the consent of petitioner, which is hereby refused.

Rule 48(a) provides that dismissals may not be filed "during the trial" without the consent of the defendant. While the language of the Rule may be deemed to be ambiguous, its purpose is not. The Notes to the Rules contain a clear statement of purpose:

> "4. The second sentence is a restatement of existing law, *Confiscation Cases,* 7 Wall. 454-457; *United States* v. *Shoemaker,* 27 Fed. Cases No. 16, 279 (C.C. Ill.). If the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a *nolle prosequi.*" (Notes to the Rules of Criminal Procedure for the District Courts of the United States, p. 44.)

In the *Shoemaker* case, *supra,* the prosecuting attorney had abandoned the prosecution and entered a *nolle prosequi,* over the objection of the defendant, after the jury had been impaneled and witnesses sworn. The court held that the defendant under such circumstances was entitled to a verdict of acquittal, for otherwise "is not the defendant manifestly prejudiced? Was he not in peril?" See also *United States* v. *Stowell,* 27 Fed. Cas. No. 16,409; *United States* v. *Schumann,* 27 Fed. Cas. No. 16,235.

Petitioner is contending before this Court, as he did before the district court and the court of appeals, that he is entitled to a judgment of acquittal because the government has conceded that it has no evidence that he ever joined the communist party. "If the trial has commenced", petitioner has been put in jeopardy, and we submit that he must have "a right to insist on a disposition on the merits", whether the issue of his guilt or innocence is pending before the district court, before the court of appeals, or before this Court on petition for writ of certiorari. Otherwise the prosecution could harass an unpopular defendant *ad infinitum* by bringing criminal

proceedings against him, pursuing them as long as success appeared probable, dropping them as soon as it appeared that the defendant might be successful, and beginning again with a new indictment. Indeed, the considerations of hardship and harassment which underlay the early cases and the provision of the Rule requiring defendant's consent to a dismissal after the trial has commenced in the district court, apply with even greater force while the case is pending in the appellate courts. See also Rules 1, 2, 54(a)(1). The more time and money consumed by the defense, the greater the right of the accused to a ruling on the merits. In the language of the Note to Rule 48(a), since "the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a *nolle prosequi.*"

In view of the novelty and importance of this question, it is respectfully suggested that a full briefing, together with oral argument, will be of assistance to the Court in arriving at its decision.

II

This Court should deny the government leave to dismiss the indictment because dismissal at this stage in the proceedings will gravely prejudice petitioner's rights.

Petitioner believes that, as demonstrated in Point I above, Rule 48(a) prohibits the dismissal of this indictment without petitioner's consent. Even if this view of the Rule should be rejected, however, Rule 48(a) specifically provides that no indictment may be dismissed except "by leave of court". We urge the Court to deny such leave in the interests of justice.

The "leave of court" provision in the first sentence of Rule 48(a) was not contained in either the Preliminary

Draft or the Second Preliminary Draft of the Rules. These drafts authorized dismissal without leave of court prior to the commencement of the trial, the rule theretofore prevailing in the federal courts. See Advisor's Notes to Drafts, and *Confiscation Cases*, 7 Wall. 454, 457 (1868). This Court, however, rejected the proposed rule as drafted and adopted Rule 48(a) as it now stands, which permits the filing of a dismissal only by leave of court.

Counsel for petitioner have been unable to find any cases arising out of the "leave of court" provision of Rule 48(a). It seems clear, however, that one of the purposes of this provision was to prevent prosecutors from using *nolle prosequi* as a weapon to harass and ultimately convict one who lacks the resources to withstand such tactical maneuvers. The Notes to Rule 48(a) as adopted expressly state that the first sentence of the rule changes existing federal law and "is similar to the rule now prevailing in many States." Notes to the Rules of Criminal Procedure for the District Courts of the United States, page 43. The state cases hold that a prosecutor cannot *nolle prosequi* an indictment for the purpose of bringing the suit before a friendlier court, or at a later time more advantageous to the state, or on a different and more easily proven charge. *Coleman* v. *State*, 83 Miss. 290, 35 So. 937 (1904); *State* v. *Milano*, 138 La. 989, 71 So. 131 (1916); *Ex parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921); *Love* v. *State*, 272 Pac. 1035 (1928) (Cir. Ct. of App. Okla.); *People* v. *Bogolowski*, 317 Ill. 460, 148 N. E. 260 (1925). To "harass the accused by indictment and prosecution * * * cannot be countenanced or permitted" (*Coleman* v. *State, supra* at 940) as such a practice "is not calculated to increase the respect that is due to the courts." *State* v. *Milano, supra* at 133. It seems clear that in preferring the state to the federal rule the Court was seeking to prevent prosecutors from dismissing indictments for the purpose of "getting" defendants in another forum or at another time or otherwise to prejudice the rights of the defendant.

The same effort at protection for the defendant underlies the Rule governing dismissal of actions in civil cases at the instance of the plaintiff. In pertinent part, Rule 41(b) of the Federal Rules of Civil Procedure provides

> "* * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * *"

The courts have held that, under this Rule, a plaintiff will not be allowed to dismiss his case in the federal courts to the prejudice of the defendant. When a dismissal is sought "not for the purpose of promoting justice, but for the purpose of defeating justice, and prolonging litigation, and depriving the defendant of a substantial right, the court ought to put its face against it." *Palmer* v. *Delaware, L. & W. R. Co.*, 222 Fed. 461, 464 (N.D. N.Y. 1915); *Henjes* v. *Aetna Insurance Co.*, 39 F. Supp. 418, 419 (E.D. N.Y. 1941). Dismissal will also be denied if there are elements "in the nature of the defense, the conduct of the parties, or circumstances appearing in the record which show that it would be inequitable to allow the dismissal without prejudice." *Olsen* v. *Muskegon Piston Ring Co.*, 117 F. 2d 163, 165 (C.C.A. 6, 1941). The trouble and expense to which defendant has been put is often the significant factor in persuading the court to exercise its discretion by denying the motion to dismiss. *Cincinnati Traction Bldg. Co.* v. *Pullman Standard Car Mfg. Co.*, 25 F. Supp. 322 (D. Del. 1938); *Colonial Oil Co.* v. *American Oil Co.* (E.D. S.C. 1943), 3 F.R.D. 29. See also for other factors which influence the courts' discretion: *In re Barnett*, 124 F. 2d 1005 (C.C.A. 2, 1942); *Chandler Bldg. Corp.* v. *Shannon*, 1 F.R.D. 105 (D. Cal. 1939); *Evans* v. *Teche Lines*, 112 F. 2d 933 (C.C.A. 5, 1940); *Butler* v. *Denton*, 150 F. 2d 687 (C.C.A. 10, 1945).

The pre-Rule 41(a) cases were to the same effect. Judge Learned Hand stated plaintiff cannot discontinue his suit "when the plaintiff's purpose is so to maneuver the

litigation that the defendant will lose his existing advantage." *Young* v. *So. Pac. Co.*, 25 F. 2d 630, 632 (C.C.A. 2, 1928). See also *Hat-Sweat Manufg. Co.* v. *Waring*, 46 Fed. 87 (C.C. S.D. N.Y. 1891); *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569 (C.C. E.D. Mich. 1893) (per Taft, J.).

Certainly federal courts, in interpreting the phrase "leave of court" in Rule 48(a), will not be less solicitous of the rights of accused in criminal cases than they have been of the rights of defendants in civil cases under the similar Civil Rule 41.

We turn now to the prejudice to petitioner inherent in the government's motion.

A

A dismissal will prevent an adjudication by this Court of the unconstitutional conduct of the United States Attorney which affects the validity of the reindictment.

There can be little question that, under the decisions of this Court (Petition, pp. 22-27) the initial indictment against the petitioner would have been promptly dismissed if the facts concerning the gross improprieties in the grand jury proceedings had been known by the petitioner at the same time that they were known to the government. The action of the United States Attorney in withholding this information from the petitioner and then seeking to suppress the facts by his own misconduct at the trial was a clear deprivation of due process of law.

This Court has stated that the government's suppression of evidence favorable to a defendant is a deprivation of due process of law. *Pyle* v. *Kansas*, 317 U. S. 213. The withholding of information by the United States Attorney is equally a violation of due process. *United States* v. *Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949); *In re Almeida*, —— F. Supp. ——, 19 Law Week. 2543 and of those "civilized standards of procedure" which this Court is zealous to protect, *McNabb* v. *United States*, 318 U. S. 332, 340.

Petitioner was on the witness stand solely because the United States Attorney violated the tenets of his office and the Constitution of the United States. The government, in its reindictment, is seeking to prosecute the defendant for statements he made on the stand at the very time that the United States Attorney was depriving him of due process of law. The questions asked, just like knowledge gained, "by the Government's own wrong cannot be used by it * * *" *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; *Nardone* v. *United States,* 308 U. S. 338, 341. Indeed, the alleged crime could never have been committed except for the "Government's own wrong." Because defendant was being deprived of due process of law at the very time the questions which form the basis of reindictment were asked, and because the government cannot take advantage of its own wrong, the *Williams case* (341 U. S. 58) provides no comfort for the government in support of the reindictment. We cannot believe that this Court intended the *Williams* case to validate indictments stemming from governmental action depriving the defendant of due process of law.

In the petition for certiorari we demonstrate that the decisions below refusing to dismiss the indictment because of the gross improprieties in the grand jury proceedings, unless petitioner were able to present proof that the foreman actually abused his position, conflict with the applicable decisions of this Court and constitute an important question of federal law involving the integrity of the judicial process (Petition, pp. 9-27). But, in addition to the public interest involved in the settlement of this fundamental issue, there would be grave prejudice to the private rights of petitioner if the indictment were dismissed at this stage of the proceedings without a decision of this Court. It would be most inequitable to require petitioner to prove in the new proceedings on the reindictment all the facts contained in the present record. Indeed, it may not be possible, in view of the government's

efforts at suppression, to make such proof. The trial and the appeal to the court below exhausted every resource of both petitioner and his family so that at the present time he is heavily in debt and without funds to defend against another prosecution undertaken with the unlimited resources of the government. Both public interest and private right require a decision on this most important question and a denial of the leave of court for dismissal.

B

A dismissal will prevent an adjudication by this Court that petitioner is entitled to a judgment of acquittal and thus will subject him to the possibility of further indictments.

Petitioner moved in the district court and the court of appeals for a judgment of acquittal on the ground that as a matter of law, based upon the government's concessions, it was apparent that there was not sufficient evidence under the perjury rule to support a conviction. In the petition for certiorari, we again urge an acquittal on this same ground and set forth basic questions in the law of perjury which demand review and determination by this Court (Petition, pp. 31-49).

The government seeks to avoid this review by announcing that it does not intend to retry petitioner on the indictment here involved for denying membership in the Communist Party. But of what protection is that to the petitioner for the future? Having shifted from the denial of membership in the Communist Party to the denial of certain associations with the Communist Party, the government can equally well shift back again. Indeed, the reindictment is for petitioner's statements at the trial which are of no significance and a shift back to petititioner's denial of membership may be promptly made. Of what public import is petitioner's denial at the trial

that he knew about a particular organization when he was in college or that he went to certain meetings when he was 19 years old or that he gave Miss Bentley information to which she was not entitled when he was in the government 10 years ago?* The United States Attorney or a new United States Attorney may determine to revert to the earlier charge—a false denial of membership in the Communist Party—and defendant could then be retried on this charge if the indictment is dismissed without a judgment of acquittal.

A judgment of acquittal would prevent the government from seeking to indict petitioner in the future for denying membership in the Communist Party. Moreover, as we

---

* This count illustrates the constantly declining public significance of the charges against petitioner. Bentley's original charge against Remington was that he had given her secret information for a treasonable purpose. When Remington was cleared of this charge by the Loyalty Review Board, the attack was focused on his denial of past membership in the Communist Party. Now that the government realizes that it has failed to sustain its proof on that charge, the attack is reduced to a charge of falsely denying that he had given Miss Bentley information to which she "was not entitled".

We note the government's assertion in this motion that defendant was re-indicted for falsely testifying "that he never gave any *secret classified information* to any unauthorized person." Count II of the indictment, annexed hereto as Appendix A, after reciting that the defendant had denied that he gave Bentley or anyone else "secret classified information or any information to which they were not entitled," or any information destined for Russia, continues in the charging paragraph as follows:

> "The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he gave to Elizabeth T. Bentley material and information obtained by him by reason of his employment by the United States Government, and to which the said Elizabeth T. Bentley was not entitled (Title 18, Section 1621, U.S.C.)."

Similarly in Count V, the government asserts on this motion that defendant was re-indicted for falsely denying that he had ever been a member of the Young Communist League. Here again the indictment charges only that his testimony about the Young Communist League "was untrue in that he knew of the existence of the Young Communist League * * *".

show in the next point, a judgment of acquittal might also have a determinative effect upon the reindictment, for the cases indicate that a man cannot be indicted for perjury for denying parts of the whole after he has been acquitted of denying the whole. (See *infra.*)

The unlimited resources of the government are such that, if the prosecution can dismiss indictments after long trials and hard-fought appeals, no accused person will ever be able properly to defend himself. Petitioner's entire resources have gone into the defense of this action. The government's effort to prevent him from obtaining an adjudication may effectively deny him his day in court.

III

The Court should not assist the government in this harassing maneuver by exercising its discretion to grant the government's motion.

By its present motion the government invokes the aid of this Court in support of a maneuver which we believe should not be sanctioned by any court. As we saw at pages 9-11, *supra,* the courts have frequently refused to permit a prosecutor to enter a *nolle prosequi* for the purpose of harassing a defendant or otherwise obtaining an unfair advantage over him. We submit that if the government can drop a prosecution for perjury at any time after the trial has commenced, and re-indict the defendant for denials of various elements of the original alleged perjury, an engine of harassment and persecution of almost limitless possibilities has been devised which has no precedent in law and which should not be sanctioned by this Court. For it permits an over-zealous prosecutor to pursue an individual, whether he be innocent or guilty, almost *ad infinitum.*

In its motion papers the government suggests that its procedure is supported by the recent case of *United States* v. *Williams,* U. S. Sup. Ct., April 23, 1951. To be sure, under the *Williams* case, a defendant can be indicted for perjury for denying at his trial for a substantive crime that he had committed that crime. But here the government seeks to go much further. If the government's present maneuver is proper, it means that Williams, having been convicted of the substantive crime of "using third degree methods" and of perjury for denying that he had done so, can now be further indicted and further punished for denying as many details of the alleged beating as he may have been questioned about either before the grand jury, in the course of his trial for the substantive offense, or in the course of his trial for perjury. Thus the length of the sentence which Williams may be compelled to serve is dependent upon the whim of the prosecutor and his ingenuity in framing questions, rather than upon the Act of Congress. As long as Williams sticks to his denial of the substantive crime, he can be re-indicted and resentenced *ad infinitum.*

Moreover, this procedure permits not only the limitless punishment of a guilty perjurer, but the limitless prosecution of an innocent man who seeks to defend himself against a charge leveled against him. For if he denies the charge under oath, he may first be indicted for perjury for that denial. If it appears after long and expensive litigation that he may succeed on appeal in establishing his innocence, the proceeding can be dropped and he can be compelled to defend himself again because in the course of his defense he has denied the details of the charge. If it appears that he might be successful at that trial and the prosecutor is sufficiently persistent, there seems to be no reason why that charge cannot also be dropped, and he can then be indicted for allegedly false denials of further details. Thus he can be forced to defend himself from one charge after another until finally, his resources exhausted and finding himself no longer able

to defend himself, he is forced to give up the struggle to clear his name, and "recant".

We submit that the perjury statute was never intended to serve such a purpose. We do not believe that more than a single crime of perjury can be predicated on statements under oath relating to a single subject, made during the course of a single continuous investigation.

In *State* v. *Shannon*, 136 Me. 127, 3 A(2d) 899 (1939), 120 A.L.R. 1166, the defendant had been acquitted of a charge of perjury based upon certain answers given during his rebuttal testimony in a civil trial. Thereafter he was indicted for other testimony relating to the same subject matter given on a different day during his direct and cross examination at the same trial. It was held that this was double jeopardy, the court saying (136 Me. 127 at 135, 3 A. (2d) 899 at 904, 120 A.L.R. 1166 at 1171):

> "• • • The State, in the first indictment, could have assigned in a single count each and every false statement which the respondent made in the entire course of the civil trial and alleged a single day certain with a continuando as the time of the commission of the alleged crime. If it had done so, proof of any one assignment of perjury would have warranted a conviction, but only one penalty could have been imposed. One crime only would have been charged. *State* v. *Nelson*, 29 Me. 329, 335. See cases already cited. Having elected to prosecute the respondent for a part of his alleged perjury, the State cannot now divide the offense with which he is charged 'into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions.'"

Similarly in the early case of *State* v. *Bishop*, 1 D. Chip. 120 (Vt. 1797), the court overruled defendant's contention that an indictment charging several separate allegedly false statements in a single count of perjury was "a charge of separate and distinct crimes", saying (p. 123): "• • • if it is, there might be so many different prosecutions commenced, and so many distinct punishments inflicted in con-

sequence of a single oath, and false swearing under that oath, which would be new, and even absurd."

To the same effect see *Black* v. *State,* 13 Ga. App. 541, 79 S. E. 173 (1913); *McLaren* v. *State,* 4 Ga. App. 643, 62 S. E. 138 (1908); *State* v. *Bordeaux,* 93 N. C. 560 (1885); *State* v. *Reidt,* 54 S. D. 178, 222 N. W. 677 (1929); *State* v. *Anderson,* 35 Utah 496, 503, 101 Pac. 385 (1909).

The same rule has been applied in cases of contempt, an analogous offense against the administration of justice: A person can be punished for only a single contempt for repeated refusals to answer a series of questions relating to the same subject. Thus in the case of *United States* v. *Emspak,* 95 F. Supp. 1012 (D. D. C. 1951), the defendants had refused to answer as many as 68 questions and, therefore, were adjudged in contempt. The district court held that the enumeration of the successive refusals in separate counts was proper because different proof was required to establish the various refusals; but it held that the sentence could only be the maximum sentence for a single contempt. See also *United States* v. *Yukio Abe,* 95 F. Supp. 991 (D. Hawaii 1950).

The state cases are in accord. The recent case of *Fawick Airflex Co.* v. *United Electrical, R. & M. Wkrs.,* 92 N. E. 2d 431 (Ohio 1950), presents the question in a situation remarkably similar to that before this Court. There the defendant on cross-examination was asked (p. 433):

"Are you a member of the Communist Party?"

"Have you ever been a delegate as the representative at a Communist Party meeting in the State of Ohio?"

"Did you attend a State convention of the Ohio Communist Party on April 30, 1944, held at Public Hall?"

When the witness refused to answer these questions, he was adjudged guilty of three offenses of summary contempt. On appeal the court held, *sua sponte,* that the trial court had erred in considering the three refusals to answer three contempts, saying (p. 436):

"It appears to the members of this court that the questions were of such character that they should be

treated as an inquiry into but a single subject. The first question asked the witness directly was whether he was a member of the Communist Party. When he refused to answer, other questions were then asked, which, if answered in the affirmative, would have established an inference that he was such member. In fact, the entire inquiry was directed toward the establishment of but one fact. The witness' refusal to answer the three questions under discussion, constituted, in the opinion of the members of this court, but a single contempt, for the reason that they all had to do with the same subject matter."

As was said in *People* v. *McDonnell,* 100 N. Y. S. 2d 463 (1950) at page 467, a contempt case raising the same point:

"* * * To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter or even to ask the same question in various forms, with the net result that a witness might be incarcerated for the balance of his life."

To be sure, the foregoing cases relate to proceedings at a single hearing, or at a single trial. But we do not believe that the principle involved should be so narrowly limited. It seems to us that testimony relating to a single subject under investigation should be the subject of only a single charge of perjury even though the investigation continues through several phases. Particularly, this should be so where both the investigating authorities and the questions asked and answers given at the successive stages are substantially the same.

The new indictment in the instant case is based upon the denials by this petitioner of the elements involved in the denial which formed the basis of the first indictment: whether or not he had ever been a member of the Communist Party. While we have not even yet been permitted to examine the record of petitioner's examination before the grand jury, that record has been sealed and can be examined by this Court. We assert with full confidence that those minutes will show that he was examined on the same subjects at length before the grand jury and sub-

stantially the same questions asked and answers given. Under the cases hereinabove cited, all these denials could have been included in the first indictment either as separate counts or as separate "specifications of perjury" in a single count. Had this been done, he could not have been punished for more than a single perjury, and it follows that he could not have been re-indicted on account of any of them after he had been finally either acquitted or convicted under any count of the first indictment. We submit that the government cannot, in such circumstances, withhold a part of the alleged perjury from the first indictment and hold it in reserve for a second prosecution to be brought in the event the first proceeding should develop in a manner unsatisfactory to the government.

To permit the prosecutor to proceed first upon the answers to some of the questions before the grand jury, and then shift and re-indict on account of answers to other questions regarding the same subject matter which were asked both before the grand jury and the pettit jury, would lead to the very evil referred to in *State* v. *Shannon*, *supra* (136 Me. at 135, 3 A. 2d 899 at 904, 120 A.L.R. at 1171):

> "* * * Having elected to prosecute the respondent for a part of his alleged perjury, the State cannot now divide the offense with which he is charged 'into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions.'"

The crime of perjury is in several respects *sui generis* and unlike any other crime. As we point out in our petition for certiorari, the court below took the position that it consisted solely of a state of mind. We do not agree with that court's conclusion that a man can be convicted merely upon proof of his state of mind. But we do agree that as a matter of philosophy, the crime of perjury essentially consists of a state of mind, which continues until and unless defendant admits his guilt. Having once denied a charge, the defendant, whether innocent or guilty, must necessarily either live with that denial or renounce

it. As often as the charge is repeated, if he has the hardihood to defend himself, he must repeat his denial, and of course that means also that he must also deny the details of the charge; otherwise he must admit it.

In this sense the crime of perjury is distinguishable from such crimes as thefts of mail and defrauding by mail *e.g., Baddars* v. *United States,* 240 U. S. 387 (1916); *Mitchell* v. *United States,* 142 F. 2d 480 (10th Cir. 1944) but *cf. Johnston* v. *Lagomarsino,* 88 F. 2d 86 (9th Cir. 1937); *Stevens* v. *McClaughry,* 207 Fed. 18 (8th Cir. 1913); or illegal sales of liquor, *Bossio* v. *U. S.,* 16 F. 2d 57 (9th Cir. 1926); *cf. Leonard* v. *U. S.,* 18 F. 2d 208 (6th Cir. 1927) but *cf. U. S.* v. *Weiss,* 293 Fed. 992 (N.D. Ill. 1923); or violations of narcotics laws *Blockburger* v. *U. S.,* 284 U. S. 299 (1932), but *cf. Braden* v. *U. S.,* 270 Fed. 441 (8th Cir. 1920), where it has been held that successive acts under a single general scheme may constitute separate crimes for which separate punishment may be imposed. For in such cases the defendant has a free choice at any time to stop his criminal activity; each new act is the result of a new and distinct criminal impulse. But the defendant who has denied a charge against him cannot stop when the charge is repeated, without either remaining silent or admitting that his previous denials were false. He has no alternative but to continue his denials or recant.

For these reasons, we think that the cases holding that only a single crime of perjury can be committed in denying a single charge, even though this may involve the denial of several elements of that charge, should control, even where the denials are repeated at successive stages of the same investigation or prosecution.

The closest analogy to this situation which we have found in the decisions of this Court is in the cases of *United States* v. *Snow,* 120 U. S. 274 (1887), and *Braverman* v. *United States,* 317 U. S. 49 (1942). In the *Snow* case this Court held that continuous cohabitation with seven alleged "wives" over a period of several years constitutes but one continuous violation of a statute making it a misdemeanor to cohabit with more than one woman in a territory of the United States. Multiple

indictments, convictions and sentences were set aside. In the *Braverman* case it was held that a single conspiracy to commit a number of separate crimes constituted only a single crime of conspiracy.

When we consider the frequency with which honest men differ in their recollection or understanding of the same facts and flatly contradict each other, even under oath, the potential dangers of such an abuse of the perjury statute as that involved in the present maneuver become readily apparent. Hardly a case is submitted to a jury, either in civil or criminal law, in which the jury is not called upon to decide where the truth lies between contradictory sworn statements of the witnesses for the opposing sides. To be sure, the primary purpose of the perjury statute is to prevent witnesses from wilfully committing perjury. But under the procedure now proposed by the government, a prosecutor could pursue an unpopular witness who has been contradicted by two or more witnesses, not once but relentlessly and *ad infinitum*. We respectfully submit that this should not be permitted, and that the appropriate way to prevent it is to hold that only a single violation of the perjury statute is committed by a defendant who denies a charge made against him, regardless of the number of incidental statements or denials he may make in support of his original denial.

The government has invoked this Court's aid in carrying out its scheme as set forth in the motion papers. We assume therefore that the merits of that scheme are before the Court. Because of the importance and novelty of the questions involved, and, because the issues raised by the petition for certiorari are necessarily involved in a consideration of the merits of this procedure, we respectfully request the Court to grant the petition for certiorari and set this motion down for argument together with the issues raised by the petition.

IV

The instant case is appropriate for a confession of error by the United States.

The termination of the litigation over the first indictment by dismissal will, as we have seen, gravely prejudice

the rights of the petitioner. We submit to this Court that the more appropriate method of terminating the litigation over the first indictment would be by a confession of error on the part of the representatives of the United States.

"The public trust reposed in the law enforcement officers of the government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young* v. *United States,* 315 U. S. 257, 258 (1942). Where the United States has doubt as to the justice of a prosecution it is "manifestly [its] duty to confess error. The public interests and the principles of justice would be satisfied with nothing less. * * *" *Parlton* v. *United States,* 75 F. 2d 772, 773 (D.C.C. 1935). The principles expressed as to the duty of public officials have guided the representatives of the United States where they "believe the interests of justice would be served by" confessions of error. Memorandum of the United States (p. 13) in *Ryles* v. *United States,* 336 U. S. 949 (1949). In pursuance of this policy, the government has confessed error in numerous cases both before and after the issuance of a writ of certiorari.* Indeed, the government has found it in the interests of justice to confess error even after opposing the writ of certiorari when further reflection has demonstrated the propriety for so doing and it is not unlikely that a similar result would occur in this case.**

The government's action in seeking to drop the initial indictment and in reindicting Remington for statements made at the trial which are said to be "not subject to any of the alleged infirmities" raised by the petition for certiorari is the final recognition of its own wrong-doing.

---

* See *e.g., Wixman* v. *United States,* 335 U. S. 874 (1948); *Bellaskus* v. *Crossman;* 335 U. S. 840 (1948); *Ryles* v. *United States,* 336 U. S. 949 (1949); *Petti* v. *United States,* 336 U. S. 916 (1949); *Fogel* v. *United States,* 335 U. S. 865 (1948); *Gibson* v. *United States,* 329 U. S. 338 (1946); *Bozza* v. *United States,* 330 U. S. 160 (1947); *Young* v. *United States,* 315 U. S. 257 (1942); *Chang Chow* v. *United States,* 286 U. S. 530 (1932); *Yim Kim Lau* v. *United States,* 286 U. S. 531 (1932); *Bates* v. *United States,* 323 U. S. 15 (1944).

** *Petti* v. *United States, supra; Fogel* v. *United States, supra.*

Earlier, doubts had been indicated even by the offending United States Attorney when he felt it necessary to consult with the Attorney General before proceeding with the trial. The Justice Department's failure to seek to sustain the conviction by review in this Court of the reversal below evidenced increasing doubts. This last action in seeking dismissal so that the government will be able to proceed on a new indictment concededly designed to avoid the fatal defects in the present proceeding shows a belated awareness of those defects. Now that the injustice and error have been recognized, "the public trust reposed in the law enforcement officers of the government" demands a confession of error.

The undoubted reason why the government has chosen the method of dismissing the indictment instead of confessing error is the effect which any confession of error might have upon the reindictment. The government apparently does not believe that the *Williams* case will necessarily support its position if the contentions made by petitioner as to the deprivation of due process of law and the proper application of the perjury rule are finally adjudicated by this Court. Thus, the very reason which prompts the government to seek dismissal instead of confessing error is the very reason why the dismissal should be denied, namely, that any dismissal will prejudice petitioner in the determination of the validity of the second indictment.

The government's motion to dismiss is not an effort to avoid further litigation; the government is not seeking to terminate its litigation with William Remington. On the contrary, by proceeding to dismiss instead of confessing error, the government is attempting a tactical maneuver in order to further its new prosecution of William Remington. Such action is not only prejudicial to the rights of petitioner, but is unbecoming the public trust which reposes in the officials of the United States and which should transcend their interest in any particular prosecution.

CONCLUSION

Petitioner requests this Court, in order to prevent irreparable prejudice to petitioner's rights and a grave miscarriage of justice, (i) to assign the government's motion for full briefing and oral argument pursuant to Rule 7(2) or, (ii) in the alternative, to grant the petition for certiorari and postpone decision on the motion until the argument on the merits.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Counsel for Petitioner.

WILLIAM C. CHANLER,
JOSEPH L. RAUH, JR.,
JOHN K. TABOR,
Of Counsel.

DARK PAGE BLEEDTHRU